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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 632

STATE OF MISSOURI, UPON THE INFORMATION OF ROY
McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MIS-
SOURI, AT THE RELATION OF THE CITY OF TRENTON, MISSOURI,
A MUNICIPAL CORPORATION,

vs.

Petitioner,

MISSOURI PUBLIC SERVICE CORPORATION, A
DELAWARE CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

We will not burden this Court with an extended reply to Respondent's Brief in Opposition to Petitioner's Application for Writ of Certiorari. We desire, however, to point out to the Court the following matters:

Respondent (Respondent's Brief, pages 2, 21) states that Respondent operated an electric generating system "under the electric franchise" (Jones Franchise) from 1897 on. This clearly is not consistent with the record in the case, as the electric light plant after it was finally built in 1891 under the Bailey Franchise, was operated under *that* franchise until it expired in 1910, and thus 24 years elapsed after the granting of the Jones Franchise before there was any claim made to be operating an electric generating and distribution system under the Jones Franchise. In this connection, we point out that Respondent (Respondent's Brief, page 21) recites that Petitioner is estopped from

denying that the Jones Franchise is valid and in force. This issue was clearly and correctly determined against Respondent in the Commissioner's report (R. 1081-1098, inclusive). The Supreme Court of Missouri avoided a decision on this point. If this Court accepts jurisdiction of this case, it will decide all issues necessary to a complete disposition of the case and we respectfully state that we shall be able to show to this Court that Petitioner is not estopped from denying that Respondent possesses a valid franchise for the operation of an electric generating and distribution system.

In arguing the issue of *res judicata* and full faith and credit to be given the judgment of the United States Federal Courts, Respondent places great weight upon the fact that the decision in the United States District Court was "no judgment on the merits" but was a dismissal for lack of interest sufficient to allow Respondent to maintain its suit. It is immaterial whether the matter was or was not disposed of "on its merit" in the sense Respondent considers that term. The issue was one which was necessarily passed upon and determined by the District Court in arriving at its judgment. Therefore, it is as an effective determination of that issue as would have occurred had the issue been decided in the course of a trial "on the merits" of the whole lawsuit. Frequently issues of tremendous importance in a case are determined in disposing of a motion prior to trial. Those issues which are necessarily determined in passing upon the motion are as effectively "*res judicata*" of such issues as when such issues are determined in the actual trial of the suit on its merits.

Respondent has avoided or overlooked the substance of Petitioner's contentions in respect to the violation of the contract clause and the due process clause of the Federal Constitution. Respondent's arguments do not meet the propositions advanced by Petitioner under Points 2 to 5 of the Reasons Relied on for the Allowance of the Writ, pages

11 to 22, inclusive, and Point B of Petitioner's Argument, pages 35 to 62, inclusive. The cases relied on by Respondent, such as *City of Trenton v. State of New Jersey*, 262 U. S. 182, 43 Sup. Ct. 534 and *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 18 U. S. 483, deal entirely with legislative action. They are applicable to situations wherein the Legislature has passed an act modifying or changing some rights claimed by the municipality. Such is not the instant case in any fashion and as shown by the cases cited by Petitioner, there are situations where the obligation of contract clause does apply to judicial action notwithstanding Respondent's statements to the contrary on page 18 of its brief.

On Page 19 of Respondent's Brief it is contended that Petitioner does not cite a single constitutional provision of Missouri or statute giving the City of Trenton the exclusive right to operate in the City of Trenton and concludes that as there are none, the City is not in a position to contend that any right which it has, is impaired. Petitioner's contentions cannot be so casually analyzed or summarily brushed aside. Respondent must show that it has a valid existing right to operate in competition with the City of Trenton. As stated in many cases and recently in the case of *People's Transit Co. v. Henshaw et al.*, 20 F. (2d) 87, 90, a decision of the 8th Circuit Court of Appeals (cited with approval in *Frost v. Corporation Commission*, 278 U. S. 515, 521, 49 Sup. Ct. 235, 237, 73 L. Ed. 483, —):

"It is very clear that the operation of buses in violation of the ordinance would directly affect the revenues of appellees. That is a vital property interest to them."

If such a vital property interest has been upheld many times in the interest of a private corporation, how can Respondent contend that such a right is not a valuable property right of the City of Trenton? Clearly the City of Trenton is entitled to the same protection against unwar-

ranted and unauthorized competition directly affecting revenues of its municipal plants.

We entirely agree with the statement on page 20 of Respondent's Brief that the rights of the City of Trenton to engage in the electric power business is subject to legislative control. That, however, is not the issue in the instant case, for no legislative action is complained of.

The case of *Eric R. Co. v. Tompkins*, 304 U. S. 654, 58 Sup. Ct. 817, is entirely with efficacy in this case. The Supreme Court of Missouri's ignoring of Section 645 R. S. Mo. 1939 and its disregard of innumerable decisions of the Appellate Courts of Missouri in liberally construing the Jones Franchise—the subject of this litigation—clearly violate the obligation of contract provision, and the due process of law provision, of the Federal Constitution. The instant case is one which not only warrants but requires the full consideration of this Court and appropriate action, to the end that the entire case may be reviewed by this Court and a fair and just decision rendered.

Respectfully submitted,

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